

*a***PUBLIC PROSECUTOR****v.****CHEW CHEE WAH***b*

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CRIMINAL APPEAL NO. 41-16-1995]
10 OCTOBER 1995

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CRIMINAL PROCEDURE: *Sentencing - Offence of criminal breach of trust by clerk or servant - Offence "shall be punished by imprisonment" - Whether binding-over order appropriate - Section 294(i) Criminal Procedure Code - Section 408 Penal Code.*

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The respondent was charged for criminal breach of trust of cash and cheques worth RM45,544.90 punishable under s. 408 of the Penal Code. He pleaded guilty and after considering the probation report and mitigation by his Counsel, the learned Magistrate bound over the respondent in the sum of RM3,000 cash for a period of 3 years. The respondent, a sales executive, pocketed collections totalling RM45,544.90 belonging to his employer over a period of two weeks after he was employed. When the police arrested him, a sum of RM1,010 was seized from the respondent, which amount was restored to his employer. The respondent was 20 years 4 months and 16 days old at the time of the offence.

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The public prosecutor appealed against the sentence imposed by the learned Magistrate, arguing that the sentence was manifestly disproportionate to the offence in view of the minimal custodial sentence of one (1) year under the amended s. 408 of the Penal Code. The respondent argued that he was a first offender having a good family background and had pleaded guilty and that he should be given a chance to be a good citizen as a term of imprisonment would do him no good.

*f***Held:***g*

[1] The respondent was not a youthful offender under s. 294(i) of the CPC and could be bound over .

[2] The words "shall be punished with imprisonment" in s. 408 Penal Code requires the Court to impose imprisonment, even for a day. However s. 294(i) of the CPC could be applied as it allows for suspension of any sentence.

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[3] The respondent had acted in a calculative manner to collect the sums without thought for its consequences. To accede to the respondent's plea for a non custodial sentence would open the floodgates and white collar offenders would flout the law with impunity. A sojourn in prison for the minimal term as allowed by s. 408 Penal Code would certainly do good to the respondent and the order of whipping would serve as a firm reminder that crime does not pay.

[Appeal allowed. Respondent sentenced to one (1) year imprisonment and 2 strokes of the whip].

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Cases referred to:

Teo Siew Peng & Ors. v. Public Prosecutor [1985] 2 MLJ 125 (*dist*)

Public Prosecutor v. Idris [1955] MLJ 234 (*refd*)

Man bin Ismail v. Public Prosecutor [1939] MLJ 207 (*refd*)

Public Prosecutor v. Loo Choon Fatt [1976] 2 MLJ 256 (*refd*)

Public Prosecutor v. Teh Ah Cheng [1976] 2 MLJ 186 (*refd*)

Public Prosecutor v. Yeoh Eng Khuan [1976] 1 MLJ 238 (*refd*)

Tukiran bin Taib v. Public Prosecutor [1955] 21 MLJ 24 (*refd*)

Chan Sit Hoon v. Public Prosecutor [1975] 1 MLJ 261 (*refd*)

Tulsidas Chhaganlal [1906] 8 Bom. LR 951, 5 Cr. LJ 5 (*refd*)

Public Prosecutor v. Lee Tin Bau [1985] 1 MLJ 388 (*refd*)

Johnson Tan Han Seng v. Public Prosecutor [1977] 2 MLJ 66 (*refd*)

Long bin Samat v. Public Prosecutor [1974] 1 MLJ 152 (*refd*)

Legislation referred to:

Criminal Procedure Code, ss. 2(i), 173A, 288(i), 293(i), 294(i),

Dangerous Drugs Act, s. 39A

Penal Code (Amendment) Act, 1993 *vide* Act A860, s. 408

Other source referred to:

Words and Phrases Legally Defined, Vol. 2, 2nd Edn., p. 82

For the public prosecutor - Azman bin Abdullah, DPP

For the respondent - C.Y. Ong; M/s. Ong & Ong

JUDGMENT**Abdul Malik Ishak J:**

The respondent was charged before the learned Magistrate, Magistrate's Court, Johor Bahru on the following charge:

Bahawa kamu pada 6 April 1994 di Ngaifoam Trading (M) Sdn. Bhd., No. 6, Jalan Riang 22, Taman Gembira, dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, sebagai jurujual syarikat tersebut yang telah di amanahkan untuk membuat kutipan ke atas jualan barangan kepunyaan syarikat, telah tidak menyerahkan wang tunai serta cek-cek bernilai RM45,544.90 dari pelanggan-pelanggan syarikat tersebut kepada majikan, sebaliknya menyalahgunakan wang dan cek-cek tersebut untuk kepentingan peribadi. Oleh yang demikian, kamu telah melakukan kesalahan yang boleh di hukum di bawah s. 408 Kanun Kesiksaan.

On 5 October 1994 when the respondent was produced before the learned Magistrate he pleaded guilty to the charge with the benefit of his learned Counsel by the name of Mr. C.Y. Ong. After listening to the mitigation advanced on the respondent's behalf by his learned Counsel and the reply thereof by the prosecuting officer, the learned Magistrate, having found the respondent guilty to the charge and convicted him accordingly, imposed a fine of RM5,000 in default ten (10) months' imprisonment. A sum of RM1,010 which was seized from the respondent and marked as an exhibit (P4) was rightly ordered to be returned to Ngaifoam Trading (M) Sdn. Bhd. ("company").

However, the learned Magistrate must have realised that by the Penal Code (Amendment) Act, 1993 *vide* Act A860, s. 408 of the Penal Code was amended by substituting for the words "may extend to ten years, and shall also be liable to fine" the words "shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine." This amendment was published in the Government gazette on 16 September 1993 and by the following day it became law. Having realised the rather embarrassing position in

- a* which he had put himself, the learned Magistrate sent up the papers for revision and, on revision, the case was remitted back to the learned Magistrate to consider afresh. Once again, on 28 February 1995, the respondent was produced before the learned Magistrate (from the appeal record, a different Magistrate) on the same charge and, surprisingly, the respondent still pleaded guilty to the same charge. After having heard the facts as narrated by the prosecuting officer to which the respondent admitted as correct, the learned Magistrate
- b* proceeded to record the respondent's guilt and convicted him accordingly. The learned Magistrate then adjourned the case for sentencing pending a report from the probation officer. It must be stressed that the respondent had the benefit of the same learned Counsel in the person of Mr. C.Y. Ong when he pleaded guilty to the same charge the second time round. When the case finally came up for sentencing before the learned Magistrate on 4 April 1995
- c* with the benefit of the probation report, the learned Magistrate bound over the respondent in the sum of RM3,000 cash for a period of three (3) years presumably under s. 294(i) of the Criminal Procedure Code ("CPC"). I say that it was a matter of assumption because the appeal record was silent as to what provisions of the CPC the learned Magistrate resorted to in binding over the respondent. Be that as it may, Encik Azman bin Abdullah, the learned deputy public prosecutor, argued that the sentence imposed was manifestly disproportionate to the
- d* offence committed by the respondent bearing in mind that the legislature, through an amendment to s. 408 of the Penal Code, saw it fit to increase the penal imprisonment and he urged me to set aside the binding over under s. 294 of the CPC and substitute it with the minimum term of imprisonment as provided for under s. 408 of the Penal Code. Mr. C.Y. Ong strenuously argued that the respondent should be given a chance to be a good citizen as any term of imprisonment would not do him any good. Being a first offender and having a
- e* good solid family background and the fact that the respondent chose to plead guilty on both occasions were said to be factors that should influence this Court to confirm the binding over as ordered by the learned Magistrate.

- It is appropriate, at this juncture, to set out the facts as admitted by the respondent before the learned Magistrate. In stark terms, the facts were that the respondent as a sales executive of the company was empowered, *inter alia*, to collect payments either in the form of cash or cheque from the customers of the company. The respondent went on a calculated spree of collecting such payments from twenty four (24) companies and instead of remitting the collections to his company, he pocketed all those collections totalling RM45,544.90. It was said that the respondent committed the said offence within a short span of two weeks after he was employed by the company. Somehow, the marketing manager of the company detected
- g* the financial short fall and reported the matter to the police. When the police arrested the respondent a sum of RM1,010 was seized from him and this was the restitution sum which the respondent restored to the company.

Section 294(i) of the CPC enacts as follows:

- h* When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to such Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the Court may, instead
- i* of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

A youthful offender is defined under s. 2(i) of the CPC to include:

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... any child convicted of an offence punishable by fine or imprisonment who in the absence of legal proof to the contrary is above the age of ten and under the age of sixteen years in the opinion of the Court before which such child is convicted.

At the time of the offence the respondent was said to be 20 years 4 months 16 days bearing in mind that he was born on 20 November 1973 and he would clearly fall outside the ambit of a “youthful offender.”

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Section 408 of the Penal Code reads as follows:

Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

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There is a dearth of authorities to show that the words “shall be punished with imprisonment” require the Court to impose imprisonment, even if it be for one day. Unlike the case of *Teo Siew Peng & Ors. v. Public Prosecutor* [1985] 2 MLJ 125, the High Court there had to consider whether s. 294 of the CPC applies to an offender who was a youthful offender at the time of the commission of offence but has since ceased to be one at the time of sentencing or appeal. Tan Chiaw Thong J whilst delivering the judgment of the Court noted the difference in wording of ss. 293(i) and 294(i) of the CPC where in the former the term “is convicted” was used, whereas in the latter the term “has been convicted” was employed and his Lordship then concluded and observed that “having regard to the power conferred upon this Court in appropriate cases to alter the nature of the sentence of the appellant, s. 294 does not debar this Court from invoking it if the appellant at the time of the appeal has ceased to be a youthful offender.” His Lordship then proceeded, in regard to the third appellant, to release him on a bond to be of good behaviour under s. 294 of the CPC. Here, at the time of the commission of the offence and at the time of sentencing the respondent was not a youthful offender and on a plain reading of s. 294(i) of the CPC the respondent could be bound over under this section. This seems to be the brunt of Mr. C.Y. Ong’s submission. In *Public Prosecutor v. Idris* [1955] MLJ 234, Thomson J was of the opinion that Magistrates should make use of s. 294 of the CPC where the offence was said to be generally of a serious nature, punishable with imprisonment and committed by an adult offender. All other cases which are thought to call for unusually lenient treatment can appropriately be dealt with under s. 173A of the CPC. In my judgment, it makes no difference between a maximum and minimum penal term that is provided in the statute and it does not displace what was stated in *Man bin Ismail v. Public Prosecutor* [1939] MLJ 207 because of the phrase “instead of sentencing him at once to any punishment” appearing in s. 294 of the CPC which in effect allows for suspension of any sentence.

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In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 the sentence of a bond to be of good behaviour under s. 294 of the CPC for a drug offence was altered to six (6) months’ imprisonment. In *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186 the offences were for possession of firearms and ammunition for which the accused who was 18 years of age was bound over to be of good behaviour and on appeal by the Public Prosecutor, the High Court Judge imposed a custodial sentence of three (3) years for each offence. In *Public Prosecutor v. Yeoh Eng Kuan* [1976] 1 MLJ 238 the offence was for possession of drugs under s. 39A of the Dangerous Drugs Act and the bond under s. 294 of the CPC was altered by the High

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a Court Judge to three (3) years imprisonment on an appeal by the Public Prosecutor. Lest I be accused of an oversight, I took note of what Bellamy J said in *Tukiran bin Taib v. Public Prosecutor* [1955] 21 MLJ 24 that “it is very desirable that a young first offender who is between the ages of 17 and 21 should be kept out of prison, if possible.” But this must be read in the context of *Chan Sit Hoon v. Public Prosecutor* [1975] 1 MLJ 261 where it was held that:

b A first offender, be on a drug charge or some other criminal charge, should be dealt with by the imposition of a fine or by placing him under bond or probation, but he should be kept away from prison unless there are, in the public interest, strong reasons for ordering a term of imprisonment, such as the gravity of the offence itself and the manner in which it is committed....

c Here, an appropriate question to pose would be this. Are there strong reasons, in the context of the public interest, to order a term of imprisonment on the respondent instead of binding him over under s. 294 of the CPC? On the authority of *Tulsidas Chhaganlal* [1906] 8 Bom. LR 951, 5 Cr. LJ 5 the offence under s. 408 of the Penal Code is said to be committed even where the act of the accused is said to cause wrongful loss to his master for a time only.

d From the facts, the respondent here committed the offence on 6 April, 1994 but there were other transactions in 1993 involving various sums of money received from various customers as reflected in exhibit (P3) but the public prosecutor saw it fit not to prosecute him and this is entirely the discretion of the public prosecutor which this Court is not entitled to comment (*Public Prosecutor v. Lee Tin Bau* [1985] 1 MLJ 388; *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 MLJ 66; and *Long bin Samat v. Public Prosecutor* [1974] 1 MLJ 152 For

e a young man, the respondent acted in a calculative manner to collect those sums without thought for its consequences. He is saying: “I have committed a criminal breach of trust of RM45,544.90. I am sorry. I am making a restitution of RM1,010. Please do not send me to prison. Please give me a second chance. I come from a good family.” To accede to the respondent’s request would open the floodgate and white collar offenders would simply flout the law with impunity. This is surely not the intention of the legislature in amending the

f penal strictures by incorporating the minimal penal servitude in section 408 of the Penal Code. A sojourn in prison for the minimal term as allowed by section 408 of the Penal Code would certainly do good to the respondent and the order of whipping too would serve as a grim reminder to the respondent that crime does not pay.

g For the reasons adumbrated above, I refused to exercise my discretionary power to bind the respondent under s. 294 of the CPC and, accordingly, I set aside the order of the learned Magistrate and substituted it with a term of imprisonment of one year commencing from 10 October 1995 and imposed two strokes of the rattan. It goes without saying that the discretion exercised by me was carried out judicially and within the framework of the meaning of ‘discretion’ as set out in *Words and Phrases Legally Defined*, Volume 2, 2nd edition at page 82 which reads as follows:

h ‘Discretion’ means that when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: *Rooke’s case* [1598] 5. Co. Rep. 996; according to law and not humour. It is to be, not arbitrary, vague, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself: *Wilson v. Rastall* [1792] 4 Term Rep. at page 757). (*Sharp v. Wakefield* [1891] AC 173, H.L., per Lord Halsbury, LC at page 179).

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On a lighter note, I must point out that only a minimal whipping of two strokes were ordered, which was a mere token gesture for the respondent bearing in mind that twenty-four strokes could have been ordered against him as envisaged under s. 288(i) of the CPC. It is my ardent hope that the imprisonment will correct, reform and rehabilitate the respondent so that by the time he rejoins society he is equipped to be a responsible and a law abiding citizen.

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